Geographic Regions Review Working Group Recommendations
Mapping Document
-- Table of Recommended Board Actions (11 October 2018) –

WG Recommendation	Community Reaction	Analysis and Suggested Board Action
Issue 1 – General Principles of Geographic Diversity *WG Recommendation "A" – "The Working Group concludes that the general principle of geographic diversity is valuable and should be preserved."*	**Pro:** The ALAC agrees that the general principle of geographic diversity is "valuable and should be preserved." ALAC notes that the origin of the ICANN Geographic Regions was the need to ensure geographic diversity within the ICANN Board. The ALAC "strongly believes that the Geographic Regions review should address that very aspect to preserve and improve the geographic diversity in the ICANN Board composition." The BC endorses the recommendations of the Geographical Regions report stating that it "strongly agrees with the report's reiteration that diversity - including geographical diversity - is essential to ICANN's mission and to the success of the multistakeholder model, as is continued emphasis on making ICANN more open to a multilingual audience through translation." The NCSG says it supports Recommendation A. **Con:** N/A	WG recommendation supported by community, including recommendations from Work Stream 2 of the CCWG-Accountability. **Accept recommendation**
Issue 2 – Applying Rigor to the Diversity Principles – and Identifying Region of Origin *WG Recommendation "B" – "Application of the geographic diversity principles must be more rigorous, clear and consistent."*	**Pro:** The NCSG and the ALAC both support Recommendation "B". The ALAC notes, "The current means for identifying an individual's region of origin is a choice between citizenship (or origin) and residency." The ALAC says, "This criterion should be more rigorous and for purposes of clarity and consistency there should be just one single criterion for the identification of a person's region". The ALAC says the current "non-rigorous approach may result in having a large number of the Board … residing and working for long time in the same region, thus having the same spirit and the same interests."	Community supports more rigorous, clear and consistent application of geographic diversity principles. **Accept recommendation**

	Con: N/A	
Issue 3 – Number of Regions *WG Recommendation "C" – "Adjusting the number of ICANN geographic regions is not currently practical."*	**Pro:** The BC agrees with the report recommendation that ICANN's geographical regions are distinct from those of many major international organizations, and that changing those regions or adding to the number of regions would be "unlikely to enhance ICANN's mission and could lead to additional cost and confusion."	Regardless of the Board's decision on this recommendation, in the next phase of this work, the Board can consider encouraging further community discussions to investigate practical ways to explore the potential formation of new regions or community groupings that are considered under-represented. A first step can be a feasibility assessment to be conducted by ICANN organization. The study results can lead to the formation of a community/staff discussion group to further explore these issues as well as broader diversity matters of interest ranging beyond geography to other diversity matters, in line with the recommendations from Work Stream 2 of the CCWG-Accountability. **Accept recommendation and direct ICANN organization to commence implementation by first conducting a feasibility assessment, the results of which will inform a community consultation on practical ways for the potential formation of new regions or community groupings**
	Con: The ALAC does not think that it is appropriate to approach the potential adjustment of the number of the ICANN Geographic Regions from the perspective of organizational or financial consequences since "the mission of the Geographic Regions Review Working Group is to find the best arrangement that may lead to more diversity as per the ICANN bylaws." The ALAC says, "The number of regions should not curb the improvement when necessary." "While we recognize that reducing the current number of the ICANN Geographic Regions is neither a desired nor a viable option", the ALAC states, "we find that adding new regions may address some of the concerns raised by parts of the community regarding their representation (the Arab and small islands communities for example)." The NCSG says it does not support Recommendation C. The NCSG says it "would like to see further discussion on practical ways to foster the formation of new regions that are under-represented, according to the community's wishes, as well as fairness in the size of Board and ALAC representation." The NCSG "does not support the Working Group conclusions that the creation of new geographical regions is not merited" and asserts that "the suggestion that there be no wholesale modifications to the existing geographical regions framework are incorrect." In fact, the NCSG "encourages the Working Group to better consider the relationship between geographic boundaries and cultural groups, and to see the formation	

	of new regions according to the community's wishes."	**that are considered under-represented.**
Issue 4 - Other International Regional Structures *WG Recommendation "D" – "No other International Regional Structures offer useful options for ICANN."*	**Pro:** NCSG agrees and accepts Recommendation D - that no other international regional structures are applicable to ICANN. That being said, the NCSG notes, "The Working Group's proposed geographical framework is largely a legacy of anachronic geopolitical arrangements." The NCSG notes that the current framework "proposes that dependent territories be allocated to the same geographical region as their 'country', regardless of their geographical location, thus continuing the legacy of cultural and institutional influence. While the NCSG acknowledges that "some international institutions, like the European Union, continue to cluster countries together based upon geographical standing", the NCSG asserts that "they have a legitimate claim to do so because they are providing their members with a mechanism to reduce cross-border transaction costs." ICANN, according to the NCSG, "can make no such claims". The NCSG also does not support the use of the United Nations Statistics Division's classifications of nations and territories as an appropriate model for ICANN to draw from. The NCSG says, "It is not fit for purpose, as evidenced by the fact that ICANN Staff themselves do not consistently use the UN's regional allocations despite committing to do so in 2000. In addition, [the UN classification] does not appropriately take into consideration geographical nor linguistic diversity." According to the NCSG, the challenge for ICANN, in resolving this tension, "will be in how it equally and usefully subdivides the globe into smaller units to form a part of a new regions framework." In doing so, the NCSG says, "we ask that ICANN consider larger cultural variations, as well as	Community comments regarding this recommendation challenge the organization to re-examine the size and scope of the current geographic regions framework. Acknowledging that no other international institutions employ structures that are applicable to ICANN, community comments suggest that ICANN consider another set of alternatives. This is an area that the Board may wish to investigate in the next potential phase of these inquiries. **Accept finding, which should form part of the feasibility assessment to be conducted by ICANN organization**

	ethnographic analyses of the regions and widespread public consultation activities to collect subjective experiences to ensure we are developing a relevant and dynamic framework which considers individualism over collectivism. The NCSG would like to be involved in the development of any such policy processes."	
	Con: N/A	
Issue 5 – ICANN's Own List of Countries and Territories *WG Recommendation "E" – "ICANN must formally adopt and maintain its own unique Geographic Regions Framework."*	**Pro:** The ALAC supports ICANN formally adopting and maintaining its own record of the assignment of countries and territories to ICANN's Geographic Regions. The NCSG supports Recommendation E, "provided that ICANN adopts and maintains [its] own geographic regions framework which both accommodates and reflects its bylaws and articles of incorporation." NCSG asks, that "this recommendation be amended to require the participation of the multi-stakeholder community in the development of this framework, and that it not be developed entirely by Staff." The NCSG also says it does not support the use of the United Nations Statistics Division's classifications of nations and territories as an appropriate model for ICANN to draw from. "It is not fit for purpose", the NCSG asserts, "as evidenced by the fact that ICANN Staff themselves do not consistently use the UN's regional allocations despite committing to do so in 2000. In addition, it does not appropriately take into consideration geographical nor linguistic diversity."	Based on community comments, the Board can direct staff to include community input in the development of the next formal ICANN Geographic Framework and, potentially, its own list of countries, territories and regions, based on the results of the initial feasibility assessment. The Board could determine that ICANN's own unique framework need not be completely different from other frameworks but could be built upon the foundation of other accepted structural models. ==**Accept recommendation and direct ICANN staff to include the development of a potential new framework as part of the community consultations to be conducted following the conclusion of the feasibility assessment.**==
	Con: N/A	
Issue 6 – Minimal Change to the current structure. *WG Recommendation "F" – "The Community*	**Pro:** The RySG says it "generally supports the recommendation that ICANN shall maintain its current geographic regions framework that is suited to the Regional Internet Registries (RIRs), while each SO or AC has	The WG's assertion that the community favored minimal changes to the current geographic regions framework was addressed in Paragraph 59

wants to minimize any changes to the current structure."	flexibility in applying the geographic diversity principles." The ALAC agrees for the time being to leave the current structure "as is", with countries and territories having the right to "opt in" for a change in region if they so wish.	of the Final Report. In that paragraph, the WG noted that of the initial comments on the Final Report by the community, "the preponderance of those commenting on the draft report favored leaving the structure 'as is'." Those comments, according to the WG Final Report, opposed "the original WG recommendation to move the organization 'to a new regional structure based (loosely) on the RIR regional structure, with countries having the right to 'opt out' of moving'." As result of that opposition, the WG's recommendation shifted to an opt-in model.
	Con: NCSG disagrees with the WG conclusion in Recommendation F stating, "We are unsure as to how the Working Group reached this conclusion because no evidence was provided in support of this statement. We have reviewed one of your earlier public consultation activities from 2009 - which attracted only one response from a community member, in support of the formation of a new region - and your claim about a strong community preference does not appear to be supported by this data, nor do we consider this exercise to be a statistically significant representation of the community's wishes." The NCSG says it "supports further discussion on how ICANN assigns countries and territories to regions." Adding, "More community input should be solicited to ensure the community's wishes are being accurately captured."	
		Community interest in closer involvement with the assignment of countries and territories to regions could be addressed by the Board directing staff to make sure that the community has the opportunity to participate in development of the new ICANN list recommended in the Final Report (see Final Report - paragraphs 8 and 84).
		<mark>Accept finding</mark>
Issue 7 – Matters of Sovereignty *WG Recommendation "G" – "ICANN must acknowledge the*	**Pro:** The IPC notes the Final Report recommends that "countries or territories should be given the opportunity to seek reassignment from one region to another" and that ICANN staff should "develop a self-selection process".	Analysis – With the conditions noted, community commenters seem to support the opportunity for a self selection process if any

sovereignty and right of self-determination of states to let them choose their region of allocation."	The IPC notes, "while these recommendations potentially create a risk of provoking international conflict, this position is prudently consistent with the longstanding IANA/ICANN policy of avoiding making determinations as to what is or is not a country." The ALAC asserts that for the sake of avoiding any interference in the relationship between the dependent countries or territories and their "mother countries", ICANN should give the opportunity to the dependent counties/territories to petition to move to a different ICANN Geographic Region – utilizing the right to "opt-in". The ALAC emphasizes, "The request should be initiated or supported by the local government of the relevant country or territory, taking into account the views of the local Internet community" and that "no territory re-assignment should be made if objections are raised by the Government of the 'mother country'." The ALAC also says, "We do not believe that the reassignment to a region that is not geographically adjacent to the existing region should be restricted. For example, if a dependent country/territory wishes to be reassigned to the region where it is physically situated but the region is not adjacent to the mother country's one, we do not understand why this kind of reassignment is not permitted." The ALAC further believes that no country/territory should be able to seek reassignment more frequently than once every 5 years, using the same cycle of the ICANN Geographic Regions Review.	state or other entity has an interest in being re-assigned to another geographic region. Based on the comments noted in this section and others noted in other sections of this report, there also seems to be a strong community desire for the opportunity to provide input into any staff effort to develop or establish that reassignment process. **==Accept recommendation, but do not limit reassignment to any timing cycle==**
	Con: The NCSG comments accept Recommendation "G" with one modification. The NCSG says, "It is outside the scope of ICANN's remit to become involved in questions of sovereignty." The NCSG asks that ICANN "promote usage of the term	

	'states and other collective entities' in place of 'states', in order to take into consideration situations such as disputed territories." This view is also noted in the terminology issue section of this report. Further, the NCSG says it, "does not support paragraph 63, point B, of the Final Report that says no country may be reassigned to a different region more than once every three years." The NCSG says ICANN should be silent on this matter as "countries and territories should be free to make this call".	
Issue 8 – Community Governance Issues *WG Recommendation "H" – "ICANN communities have flexibly applied geographic diversity principles over the years. While the Board should remain strictly subject to the current framework, flexibility should be preserved for other structures."*	**Pro:** The NCSG accepts recommendation H, but suggests the recommendation "be reworded to stress that ICANN requires a community-wide strategy." The NCSG states, "We understand this is the intention of the report, but how this recommendation currently reads suggests that different supporting organisations could develop their own geographic regions frameworks." The IPC notes, "the general theme of Recommendations A through F is that 'for the time being' the existing methodology of ICANN geographic region designation should be maintained and continue to be applied, in particular to the selection of members of the Board (which the Final Report identifies as being the original purpose of the concept of geographic diversity within ICANN, dating back to the US Government's Green Paper leading to the formation of ICANN)." Noting this approach, The IPC goes on to assert, "Recommendations H and I provide that communities within ICANN have the option of following that methodology or adopting some other Board-approved methodology for ensuring geographical diversity. The Final Report notes that individual communities should have time for and flexibility in ensuring how best they deal with diversity, but also notes that it is desirable that current inconsistencies across communities (SOs, ACs, SGs, Cs, etc.) are minimized.	Analysis – The community comments express an understanding of the need for consistency in the application of a geographic framework across the organization. They express reservations about potential negative consequences if individual communities interpret the WG guidance to give them the ability to create their own separate geographic frameworks. The WG recommendation to keep all these matters under Board oversight (Recommendation "K") should be sufficient to prevent any inconsistent geographic frameworks from being developed by individual communities. Nevertheless, it would be advisable that any Board decision should make efforts to provide clear direction on the limits, if any, on individual community flexibility in this area.

	Con: The IPC notes, "these recommendations overlap with the ongoing work by external consultancy Westlake Governance Limited ("Westlake") to review the GNSO". The IPC "questions whether the [WG] and Westlake were aware of each other's efforts in relation to geographic diversity. The IOC says, as a general principle, it believes "overlapping efforts within the community are an inefficient use of ICANN funds and scarce volunteer time resources, and further believes that the risk of potentially conflicting outcomes from overlapping initiatives should be avoided." The IPC notes the WG Final Report "is NOT suggesting that each SO or AC be permitted to create its own regional framework" and "questions whether this was taken into consideration by Westlake in its recent review of the GNSO."	<mark>**Accept recommendation. Ongoing Board review of community charter documents should provide appropriate level of future oversight.**</mark>
Issue 9 – Interest Groups *WG Recommendation "I" - "'Special Interest Groups' or 'Cross-Regional Sub-Groups' offer new diversity opportunities."*	**Pros and "Cautions":** The IPC notes that the WG recommends mechanisms for "special interest groups" to self-designate and participate through those groups within the ICANN environment. These groups, which "might restrict their interest to a single SO or AC, while others might span all of ICANN's communities", would not be formally recognized within or replace the ICANN structure, but rather "would be complementary" to it. The IPC notes, "It is not clear how such groupings will interact with the formally recognized ICANN structures: will the Board, SOs and ACs be required to interact in a consistent way with these groupings? If so, how will this procedurally be achieved? The IPC notes that such an approach potentially risks contravening the longstanding IANA/ICANN policy of avoiding making determinations as to what is or is not a country. The ALAC is in full support of recognizing and accommodating "Special Interest Groups" based on common specificities such as	Analysis –The WG made an effort to specifically define the parameters of potential new special interest groups that may wish to form (see Final Report at paragraph 78). If the Board is inclined to adopt this recommendation, it may wish to follow those parameters or articulate others consistent with the community comments. Community concerns expressed in this area reflect a cautious approach to the actual implementation of this and other WG recommendations. Board direction to staff with respect to implementation could include the expectation of

| | culture, language, etc., assuming that those "Special Interest Groups" do not replace the adopted geographic regions.

The NCSG "partially" supports recommendation "I". The NCSG says, "We are in agreement that 'cross-regional subgroups' that are not currently aware of ICANN's work - but may become aware of it in the future - should be warmly welcomed into the community. However, we consider it inappropriate to extend the same principle to 'special interest groups'." The NCSG says, "If a more precise definition of this term can be provided and agreed upon across the supporting organisations, our objection may not be sustained". "Our fear", says the NCSG, "is that this term could be applied to disputed territories, leading to a situation where ICANN is giving credence to a state that does not accept the autonomous existence of another entity." In that case, the NCSG posits, "We would have two distinct categories, states with full status, and 'special interest groups' with an inferior status." | community collaboration to help confirm or further define the appropriate parameters for the formation and activities of potential special interest groups.

==Accept recommendation. Board review of community charters (or bylaws) should provide appropriate level of oversight.== ==Direct staff to develop draft guidelines for community consultation following conclusion of the feasibility assessment and based on its results.== |
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| **Issue 10 – Implementation Mechanisms**

WG Recommendation "J" – "Implementation mechanisms and processes must be developed by Staff." | **Comments:** The NCSG notes its partial support for Recommendation J and acknowledges that "Staff will need to do the majority of the work in developing internal operating procedures and other resources." However, the NCSG notes, "the multi-stakeholder community must remain involved in all policy-making processes, especially in relation to the development of criteria for evaluating the success and failure of the geographic regions framework."

"As for the implementation mechanisms, and in order to ensure a smooth 5 year review and a high quality of the process by which re-assignments are considered", the ALAC suggests that "ICANN set up an Ombudsman for Global Issues (OGI), assisted by a handful of experts from various parts of the community. This small group would receive requests from governments, associations, groups or individuals wishing to avail | Analysis – Based on comments regarding this and other recommendations, there is clear community interest in active collaboration with staff on a number of the implementation matters associated with the WG recommendations (e.g., the opt-in process and the new ICANN regions list assigning states and other entities to particular regions). Depending on the recommendations, if any, that the Board adopts or modifies, the component of community staff collaboration is likely to be a major consideration. |

	themselves of the "opt in" or "opt out" scheme being considered." According to the ALAC, "This OGI would report to the Board, bringing to their attention specific cases and proposing solutions." The ALAC says, "This would not, or very marginally, impact the role of the existing Ombudsman."	Consideration of the ALAC's OGI idea could be incorporated into a potential implementation discussion of the opt-in concept described in the language of WG Recommendation "G" (Issue 7) above. **Accept recommendation. Direct staff to develop, proposed new framework (assigning countries and territories to regions), "opt-In" scheme and guidelines (as outlined above) for community consultation following the conclusion of the feasibility assessment and based on its results.**
Issue 11 - Board Review *WG Recommendation "K" - "The Board must preserve its oversight and future review opportunities."*	**Pro:** The ALAC believes that the Board should have the ultimate oversight over the ICANN Geographic Regions' framework including the 5 year review and reassignment process.	**Accept recommendation. Discussions over a future framework should include the possibility of establishing a future 5-year review cycle and Board role in assessing any specific community plans regarding geographic diversity within individual community charters or bylaws provisions and in light of the recommendations from Work Stream 2 of the CCWG-Accountability.**
	Con: The NCSG does not support recommendation K in its present form. The NCSG says, "We believe that oversight should be a joint community and Board responsibility, particularly on matters integral to the functioning of the ICANN community."	
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ICANN GEOGRAPHICAL REGIONS

**Final Report by the
Geographic Regions Review Working Group**

October 2015

Executive Summary

1. In this Final Report, the Geographic Regions Review Working Group (hereinafter the "Working Group") reviews its efforts and makes a number of recommendations to the ICANN Board for modifications to the application of the ICANN Geographic Regions Framework.

2. The Working Group was formed by the Board to (1) identify the different purposes for which ICANN's Geographic Regions are used; (2) determine whether the uses of ICANN's Geographic Regions (as currently defined, or at all) continue to meet the requirements of the relevant stakeholders; and (3) submit proposals for community and Board consideration relating to the current and future uses and definition of the ICANN Geographic Regions.

3. The Working Group finds that the ICANN principle of geographic diversity remains important and relevant to ICANN's mission. Over the course of its deliberations, the Working Group has (1) reviewed the underlying history, objectives and general principles of ICANN"s Geographic Regions Framework, (2) identified the various applications and functions to which the regions framework has been applied by existing structures and the ICANN staff; and (3) engaged the community in an extensive collaborative dialogue about issues and potential solutions to maintain and potentially expand the value of the geographic regions framework for the entire community.

4. In 2000, the ICANN Board directed Staff to assign countries and territories to geographic regions on the basis of the United Nations Statistics Division's existing classifications. However, the Working Group has found that in mapping the UN Statistics' categorization into ICANN's pre-defined Regions, the Staff apparently deviated significantly from the UN allocations.

5. Despite these deviations from the Board's original objective, the Working Group concludes that over the past decade, ICANN has largely applied geographic diversity principles consistent with the organization's diversity goals.

6. The Working Group attempted to identify an alternative consistent or standard geographic categorization model with international recognition that would better meet ICANN's requirements. Unfortunately, no such model has been found.

7. The Working Group concludes that wholesale modifications to the original geographic regions framework is not merited, and recommends that ICANN adopt its own Geographic Regions Framework based upon the current assignment of countries to regions. This new framework system should govern the make-up of the ICANN Board. However, to provide flexibility to individual communities and structures within ICANN, it is recommended that for the time being they be

permitted to:

    a.   follow the same framework as the Board, or

    b.   develop their own mechanisms (with Board oversight) for ensuring geographic diversity within their own organizations.

8.   The Working Group recommends that the Board should direct Staff to prepare and maintain ICANN's own unique organizational table that clearly shows the allocation of countries and territories (as defined by ISO 3166) to its existing five Geographic Regions.[1] The initial allocation should reflect the *status quo* of the current assignments. However, Staff should also develop and implement a process to permit stakeholder communities in countries or territories to pursue, if they wish, re-assignment to a geographic region that they consider to be more appropriate for their jurisdiction.

9.   Just as the Internet has evolved technically, structurally and geographically over the past decade, ICANN should manage its own evolution to ensure opportunities and make potential allowances for cultural and language diversity. In that context, the Working Group recommends that ICANN seek ways to recognize and accommodate Special Interest Groups to promote the interests and unique attributes of stakeholder communities that may not clearly fit into the formal top-down regional structures. These "bottom-up" groupings would be complementary to the formal regional framework, and would not replace it. They would not form any part of ICANN's decision-making structure but would be free to lobby for the support of elected representatives.

10.   Finally, the Working Group recommends that the Board maintain oversight over the existing geographic regions framework at all levels within the ICANN organization and review the effectiveness of its application at regular five-year intervals.

I. Introduction

A. Background

11.   The ICANN Bylaws provide that a core value of the organization is "seeking and supporting broad, informed participation reflecting the functional, **geographic**, and cultural diversity of the Internet at all levels of policy development and decision-making." See ICANN ByLaws - Article 1, Section 2, paragraph 4.

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[1] The Working Group also examined whether or not the number of ICANN Geographic Regions should be increased (or decreased) from the present five. It concluded that a change at this time would not be cost-effective but that the question should be reviewed at regular intervals in the future.

12. The ICANN Bylaws define five geographic regions[2]:

- Africa;

- North America;

- Latin America/Caribbean;

- Asia/Australia/Pacific; and

- Europe.

13. The ICANN Geographic Regions were originally created as a means of attaining geographical diversity in the composition of the ICANN Board. By an ICANN Board resolution in 2000[3], Staff was instructed to assign countries to geographic regions on the basis of the United Nations Statistics Division's (UNSD) current classifications[4]. It also introduced the concept of "citizenship" in relation to the use of ICANN Geographic Regions.

14. Subsequently, the ICANN Geographic Regions framework was applied in various ways when defining the organizational structures for the ALAC, GNSO, and ccNSO.

15. In a September 2007 Report to the ICANN Board[5], the ccNSO highlighted a number of concerns about the current definition and use of Geographic Regions and recommended the appointment of a community-wide working group to study these issues. At its meeting in Los Angeles, November 2007[6], the ICANN Board requested the ICANN Community, including the GNSO, ccNSO, ASO, GAC, and ALAC, to provide ICANN Staff with input on the ccNSO's recommendation.

16. Following input and support from the GNSO, ALAC, and GAC, the ICANN Board at its Public Meeting in Cairo (November 2008)[7], authorized the formation of the proposed working group. The Board subsequently approved the Working Group's Charter on 26 June 2009.[8]

17. The Working Group Charter outlined a three-stage process to include a thorough review of the geographic regions framework, effective community collaboration

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[2] www.icann.org/en/general/bylaws.htm#VI-5
[3] www.icann.org/en/minutes/minutes-16jul00.htm
[4] http://unstats.un.org/unsd/methods/m49/m49regin.htm
[5] http://ccnso.icann.org/workinggroups/ccnso-final-report-regions-wg-240907.pdf
[6] www.icann.org/en/minutes/resolutions-02nov07.htm#_Toc55609368
[7] www.icann.org/en/minutes/resolutions-07nov08.htm#_Toc87682556
[8] Copies of the Charter, in all six UN languages, are posted in the Public Comment Forum Box on the ICANN Public Comments web page (see - http://www.icann.org/en/public-comment/public-comment-200909.html#geo-regions-review.

between various supporting organizations and advisory committees, and production of final recommendations that had community support.[9]

B. Part I: The Initial Report

18. The Working Group first prepared an Initial Report outlining the current applications of ICANN's geographic regions within various ICANN structures and processes, and confirming the issues the Working Group planned to address during its deliberations. That Initial Report was published in all six official UN languages on 31 July 2009 and was made available for community review and comment for a 35-day public comment period (see http://www.icann.org/en/news/public-comment/geo-regions-review-31jul09-en.htm.

19. The Initial Report included three questions for which the Working Group wanted feedback from the community. First, notwithstanding its own research, the WG was particularly interested to learn if it may have missed any specific uses or applications of the geographic regions framework in ICANN's organizational structures. The WG also asked the community to confirm that the scope of its work should not be extended into other specific operational applications where geographic considerations were being used by ICANN Staff.

20. Second, the Initial Report identified Representation, Participation and Operations as the three primary "usage categories" for which geographic regions are currently being applied within the ICANN community. Those categories were to become an important component of the Working Group's analytical framework. The Working Group wanted community confirmation that the "usage categories" it identified were sufficient and appropriate.

21. Finally, the Initial Report set forth a list of 25 potential "Matters To Be Taken Into Consideration" and asked for community feedback on whether any issues should be deleted or others added to the list.

C. Part II: The Interim Report

22. The Interim Report built on the foundation of the Working Group's Initial Report and focused on general principles, specific considerations and some of the critical issues that the Working Group intended to address in its Final Report document. The report offered (a) a review of the underlying history, objectives and general principles of ICANN's Geographic Regions Framework; (b) it raised a number of

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[9] This operational structure manifested itself in the expected publication of three separate but related reports – an initial report, an interim report and a final report. This document reflects the third step in that process.

fundamental strategic questions for further community consideration; and (c) it expanded on a number of specific matters identified in the Initial Report that were likely to be addressed in the Final Report. That Interim Report was published in all six UN languages on November 12, 2010 and was made available for community review and comment for 80 days (see http://www.icann.org/en/news/public-comment/geo-regions-interim-report-12nov10-en.htm).

23.   The Interim Report thoroughly reviewed the historical applications of the ICANN Geographic Regions Framework from its origins in the "Green Paper"[10] until the present day. It examined the history of ICANN's principle of "geographic diversity" and the evolution of the Geographic Regions Framework.

24.   From that research, the Working Group concluded that:

a. Geographic Regions were first defined as an aid to ensuring "broad international representation" on the ICANN Board. Initially they had no other purpose.

b. The U.S. Department of Commerce/NTIA and other stakeholders expected that the make-up of the ICANN Board should "reflect the geographical and functional diversity of the Internet". As they anticipated that the Internet would change over time, they believed that the procedures for appointing Board Members should be "sufficiently flexible to permit evolution to reflect changes in the constituency of Internet stakeholders". Opinions on this issue were sufficiently strong at the time that ICANN felt bound to amend its initial Bylaws to add "language making it clear that any consideration of changes in the countries included in geographic regions or other matters relating to geographic diversity will take into account the evolution of the Internet."

c. The three-year review cycle of the then Section 6 of the Bylaws (International Representation) was intended to cover the Regions themselves as well as the allocation of countries to each Region.

d. There is nothing in the public record that definitively explains how the original five geographic regions were selected. One hypothesis is that because the Green and White Papers both suggested that representatives of APNIC (Asia/Australia/Pacific), ARIN (North America) and RIPE (Europe) should be on the ICANN Board, these three RIRs helped to determine the first three official

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[10] On 30 January 1998, the U.S. Department of Commerce issued a discussion document entitled, "A Proposal to Improve Technical Management of Internet Names and Addresses." This document was called the "Green Paper". After a period of public consultation, the Green Paper was followed on 5 June 1998, by a Statement of Policy issued by the U.S. National Telecommunications and Information Administration ("NTIA"). The second document was dubbed the "White Paper".

Regions with Latin America/Caribbean and Africa being projected as the next most likely RIRs to be established.

e. Notwithstanding the origin of ICANN's five geographic regions, the Working Group concluded that the framework did not reflect any commonly recognized division of the world such as "continents"[11], nor was it derived from any framework used by any other internationally recognized organizations. This Regional construct appears to be uniquely applicable within ICANN.

f. As a consequence of paragraph (e) above, the Working Group found that subsequent attempts to strictly allocate countries to Regions "in accordance with international norms"[12] or to adopt "some independently prepared and authoritative list"[13] were destined to be unsuccessful.

g. The Working Group was unable to find any resolution of the ICANN Board authorizing the current allocation of countries to geographic regions.

25. In the Interim Report, the Working Group built on its understanding of the historical underpinnings and evolution of the Geographic Regions Framework and addressed a series of fundamental questions including: (1) has the Framework produced its desired effect?; (2) are the five regions still relevant, reasonable and defensible [in the present day]?; and (3) are the regions, in fact, consistent with the international norms of today?

26. Additionally, the Working Group addressed each of the 25 "Matters To Be Taken Into Consideration" introduced in the Initial Report and grouped them into 17 general principles and specific issues including, for example, "Application and Evaluation of Geographic Diversity in a Wider Context", "The Evolving Needs of Regions and Future Users", "Importance of Flexible Application/Implementation and "Number of Regions", etc. For each topic, the Working Group provided discussion of the principle or issue, and listed options and potential community impacts.

D. Part III: This Final Report

27. Building off the discussion of general principles and specific issues in the Interim Report, this Final Report provides specific recommendations from the Working Group to the ICANN Board that are intended to ensure that the organizational

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[11] http://en.wikipedia.org/wiki/Continent#Number_of_continents
[12] www.icann.org/en/committees/gac/communique-14jul00.htm#D
[13] www.icann.org/en/minutes/minutes-16jul00.htm

principles of geographic and cultural diversity are honored and maintained.[14] Those recommendations are based upon (a) the Working Group's own thorough research, (b) extensive community consultation, and (c) assimilation of various viewpoints representing a broad cross-section of the ICANN community.

28.   A draft version of this Final Report was circulated to the community for review and comment before it was finalized into this "final" Final Report. The draft document was posted for community comment for an 80-day period (see http://www.icann.org/en/news/public-comment/geo-regions-draft-final-report-30sep11-en.htm). Community feedback on that draft report prompted further Working Group discussion and resulted in several significant adjustments to its initial draft recommendations that are fully explained beginning at paragraph 39 below. A tracking checklist of community comments and Working Group responses has been prepared and can be found on the Working Group's Confluence Community wiki page at – https://community.icann.org/display/georegionwg/Final+Report+Draft+Issues+Matrix. This document reflects the results of all those discussions and adjustments and reflects the final recommendations of the Geographic Regions Review Working Group to the community and the Board.

29.   According to the Working Group Charter approved by the Board, each community Supporting Organization and Advisory Committee that contributed members to the Working Group had the opportunity to review and comment on this document before its submission to the Board.[15] Briefings were made available to all SO-AC

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[14] The ASO/NRO (RIR) representatives kept a neutral position throughout the WG proceedings and have not proposed, supported or endorsed the WG final recommendations.

[15] Feedback was received from the ALAC, ccNSO and GNSO communities and copies of those transmissions are included in this Final Report document as appendices to this report. The ASO ultimately did not submit final feedback. The GAC Chair also provided feedback that is integrated into footnote 21 of this Final Report document.

The SO-AC review and comment process is governed by the Working Group Charter Sections 4 "Processes and Working Methodology". Specifically:

"d. Working Group methodology

…The Final Report shall be published within fourteen (14) days after adoption of the Report by the GEO WG and conveyed to the chairs of the SOs and ACs participating in the WG.

e. Support for GEO WG Final Report

Following its submission, the ACs and SOs who have contributed representatives to the WG shall discuss the GEO WG Final Report and decide whether they support the recommendations. The Chairs of the SOs and ACs shall notify the Chair of the GEO WG in writing of the result of their deliberations.

f. GEO WG Supplemental Final Report

In the event that any SO or AC who has contributed representatives to the WG does not support the recommendations, it will inform the GEO WG in writing of its reasons. The GEO WG may, at its discretion, reconsider its report and submit a re-drafted Final Report to seek support.

g. GEO WG Board Recommendations

leadership during the ICANN Public Meeting in Durban, South Africa.

II. Community Participation-in and Reaction-to the Working Group Effort

A. Extensive Participation Opportunities

30. In fashioning its recommendations, Working Group members have taken into consideration the importance, political sensitivity and operational repercussions of the geographic regions framework within various segments of the ICANN community.

31. The Working Group was challenged by the Board to ensure multiple opportunities for community input. ICANN's SOs and ACs were given the opportunity to comment on the community-wide working group concept and each community was invited to send participants to be involved with the working group (all but the RSSAC have contributed members). The public and the entire ICANN community had the opportunity to comment on the proposed charter of the Working Group before it was approved by the Board (see http://www.icann.org/en/news/public-comment/regions-charter-18feb09-en.htm).

32. Every written report generated by the Working Group has been published in all six UN languages and each has been subjected to extended community review and comment opportunities. Working Group members individually reported on the group's progress to their respective communities. Seeking another form of community input, the Working Group also sponsored a community survey (in the six UN languages and Portuguese) regarding community member understanding of and attitudes toward the geographic regions framework.

33. Additionally, public workshops and community discussion sessions and forums were conducted during six ICANN Public Meetings in Brussels (June 2010),

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In the event the GEO WG Final Report or GEO WG Supplemental Final Report is supported by the SOs and ACs who have contributed representatives to the WG, the GEO WG shall, within 5 days, submit to the ICANN Board its recommendations. This will include:
(i) The (Supplemental) GEO WG Final Report;
(ii) The written confirmations of support from the SOs and ACs who have contributed representatives to the WG.
In the event the GEO WG (Supplemental) Final Report is not supported by all the participating SOs and ACs, the GEO WG may submit the (Supplemental) Final Report, and the statements of support and disagreement to the ICANN Board."

Cartagena (December 2010), San Francisco (March 2011), Singapore (June 2011), Dakar (October 2011) and Costa Rica (March 2012) to gather community perspectives on this matter.

B. Reactions To The Interim Report

34. Understanding the historical underpinnings and evolution of ICANN's Geographic Regions Framework prompted the Working Group to ask several fundamental questions of the ICANN community in its Interim Report.

    a. Has the existing geographic regions framework produced its desired effect?

    b. Are the five regions still relevant, reasonable and defensible in the present day?

    c. Are the regions, in fact, consistent with the international norms of today?

35. The community response to the Interim Report was diverse but limited[16], Written and verbal comments on the Interim Report addressed a variety of topics.[17] One category of comments addressed the scope of the Working Group's potential recommendations. A number of comments said the Working Group should not feel constrained to recommend adjustments to the geographic regions framework. A second category of comments focused on the types of adjustments the Working Group should recommend. The full list of issues and matters raised by the commenters include:

    a. The Scope of Potential Recommendations Available to the Working Group;

    b. A Caution About Unintended Consequences;

    c. Opinions Regarding the Existing Geographic Regions Framework;

    d. How To Classify Regions – Options for Working Group Recommendations;

    e. Option - Considering the Creation of New Regions - A New Region for "Small Island Developing States";

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[16] Four (4) substantive and relevant written community submissions were submitted regarding the Interim Report. The Working Group also collected comments from the community at a Workshop held on 9 December 2010 during the ICANN Public Meeting in Cartagena, Columbia (see http://cartagena39.icann.org/node/15465). Combined substantive comments (both written forum comments and verbal workshop contributors totaled 19.

[17] Some topic areas unavoidably and necessarily overlapped.

f.   Option - Relocating Specific States to More Appropriate Regions;

g.   Considering the Purpose of Geographic Diversity in ICANN Processes;

h.   Culture, Language and Other Measures of Diversity; and

i.   The Need to Regularly Review The Geographic Regions Framework[18]

C. Production of a Draft Final Report

36.   The Working Group analyzed the community feedback to the Interim Report and produced a draft Final Report incorporating a number of potential recommendations. Given the extensive consultative nature of this effort and mindful of the potential implications even small changes to the framework could have on the wider community, the Working Group decided to make the draft document available to the community for review and comment before the Working Group formally published its Final Report.

37.   As explained in paragraph 29 above, a Draft Final Report was published to the community in all six UN languages on 30 September 2011 for community review and comment. That comment period concluded on 19 December 2011. A total of nine different entities submitted ten comments in the forum regarding the Draft Final Report. The Working Group also collected comments from the community at a workshop hosted on 27 October 2011 at the ICANN Public Meeting in Dakar, Senegal (see   http://dakar42.icann.org/node/27021).   In addition to the normal Public Comment Meeting Report, the Working Group also produced a Public Comment Issue Tracking Checklist to help it capture and track the treatment of various   substantive   community   comments.   (see https://community.icann.org/display/georegionwg/Final+Report+Draft+Issues+Matri x).

38.   The community comments regarding the Draft Final Report prompted the Working Group to hold another Community Workshop during the ICANN Public Meeting in San Jose, Costa Rica (see - http://costarica43.icann.org/node/29703). That workshop session and the written community comments caused the Working Group to reconsider a number of its proposed recommendations.[19]

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[18] The Staff produced a report of all the community comments (see -
https://community.icann.org/download/attachments/11141619/Report+of+Public+Comments+on+Geo+Re gions+Review+WG+Draft+Final+Report+%28Feb2012%29%28FINAL%29.pdf?version=1&modificationD ate=1367861580000
[19] A significant community point was the concern that potential changes proposed by the Working Group were taking place at the same time that ICANN was implementing the new gTLD program.

III. Final Working Group Recommendations

39. After much consideration of the community feedback to its Draft Final Report, the Working Group has concluded its deliberations. This section reflects the final recommendations from the Working Group to the Board. It is the product of substantial community input and Working Group reflections over a substantial period of time.[20]

40. Set forth below, the Working Group outlines a number of specific conclusions and recommendations regarding the ICANN Geographic Regions Framework. The conclusions and recommendations include:

   a) The Working Group concludes that the general principle of geographic diversity is valuable and should be preserved.

   b) Application of the geographic diversity principles must be more rigorous, clear and consistent.

   c) Adjusting the number of ICANN geographic regions is not currently practical.

   d) No other International Regional Structures offer useful options for ICANN.

   e) ICANN must formally adopt and maintain its own unique Geographic Regions Framework.

   f) The Community wants to minimize any changes to the current structure.

   g) ICANN must acknowledge the sovereignty and right of self-determination of states to let them choose their region of allocation.

   h) ICANN communities have flexibly applied geographic diversity principles over the years. While the Board should remain strictly subject to the current framework, flexibility should be preserved for other structures.

   i) "Special Interest Groups" or "Cross-Regional Sub-Groups" offer new diversity opportunities.

   j) Implementation mechanisms and processes must be developed by Staff.

   k) The Board must preserve its oversight and future review opportunities.

   l) In view of the substantial period of time taken to present this Final Report to

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[20] The Working Group is aware that Section 4 of its charter document holds the potential prospect of another round of community consideration. *See* Footnote 17 above.

the ICANN Board, the Working Group recommends that the Board direct staff to manage a public comment period of at least 120 days to give the community an opportunity to thoroughly review the proposals and provide any additional comments on its recommendations. Given other community workload demands associated, requests for additional time for review and comment from any communities should be honored.

A. The General Principle of Geographic Diversity is Valuable and Should Be Preserved

41. ICANN Bylaws Article 1, Section 2 details ICANN's Core Values. These include, at paragraph 4, the goal of:

    "Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making."

42. The Working Group's research reveals that the ICANN community has done a good job of incorporating functional and geographic diversity into the operations of its various communities - if not as part of a clearly delineated strategy, at least in spirit on a community-by-community basis.

43. Because Bylaws Article 1, Section 2 uses the distinct terms "functional", "geographic" and "cultural" diversity, one could argue that each category should have its own operational principles, framework or system. The Working Group concludes that honoring the spirit of Article 1 Section 2 does not require such comprehensive action but it does obligate the organization to employ a framework that allows those principles to be considered by every ICANN community.

44. The Working Group believes that the general principle of Geographic Diversity is valuable and should be preserved. No dissenting opinions have been received.

B. Application of the Geographic Diversity Principles Must Be More Rigorous, Clear and Consistent

45. In 2000, the ICANN Board directed Staff to assign countries to geographic regions on the basis of the United Nations Statistics Division's (UNSD) current classifications. The Working Group agrees with the September 2007 ccNSO report to the Board that, as currently comprised, the five ICANN geographic regions are significantly different from those defined by the UNSD. The Working Group has found that over time, since the year 2000, any connection to the UNSD classifications has eroded as the concept of geographic diversity has been expanded beyond application to the ICANN Board and has been extended to include other organizational structures (primarily Supporting Organization and

Advisory Committees – "SOs and ACs") within the ICANN community.

46. The application and evolution of the geographic regions structure beyond the Board to more ICANN communities and structures over the past decade appears to have been largely on a community-by-community basis, primarily at the time the Bylaws for each community were originally drafted, and has not been driven by a consistent strategic application of the geographic regions framework.

47. The present ICANN geographic regions do not equate to any internationally recognized method of defining the regions of the world, nor do they reflect the current make-up of the Internet community (and it is questionable that they have ever done so).

48. Despite this departure from the original framework, the Working Group has found that extending the principles of geographic diversity beyond the Board to other structures and communities has been largely positive. However, it has also created a large number of organizational anomalies that should be resolved. As the ICANN organization continues to mature, the Working Group believes it is critical for the organization to adopt a more rigorous approach by re-defining a clear and consistent classification framework that assigns countries and territories to regions.

C. Adjusting the Number of ICANN Geographic Regions is Not Currently Practical

49. Based on its research and exchanges with the community, the Working Group concludes that reducing the number of ICANN regions is neither a desired nor a viable option. For example, community members have expressed concern that the size and allocation of the current regions already requires some community members to travel large distances to participate in regional events. Reducing the number of regions would exacerbate this problem. As no one advocated for fewer regions, this option was not considered further.

50. In addition to promoting geographic diversity, ICANN's structures and processes should lower barriers for participation and engagement by community members as much as practicable. The sizes of the current regions do create circumstances where some individuals must travel long distances for face-to-face meetings. Smaller (more) regions could address this concern. There have also been calls for the creation of new regions (e.g., Arab states and small island nations).

51. However, increasing the number of regions at this time would have a substantial impact on the organizational structure, resources, processes and practices of ICANN. The addition of even one region to the framework would almost certainly require the Board and ICANN communities to adjust or expand their management and administrative structures in some substantial ways.

52. For example, in the At-Large community there are currently five Regional At-Large Organizations (RALOs) that are designed to reflect the five ICANN Geographic Regions. In addition to changing the composition of the management structures, adding a new region to the existing geographic regions framework would likely necessitate the creation of a new RALO with a similar infrastructure of the existing RALOs. This would require ICANN to make available additional in-person meeting facilities (physical rooms at ICANN meetings) or arrange expanded telephone conference capability for community meetings and could increase the ICANN travel budget.

53. Additionally, some community commenters noted that it is already challenging for some stakeholder communities to meet the geographic diversity requirements in their respective ICANN structures. The creation of any new geographic regions – in the short run – could contribute to a shortage of potential community participants in various ICANN structures.

D. No Other International Regional Structures Offer Useful Options for ICANN

54. The Working Group has reviewed many different geographic regional structures as applied by various international organizations. The Working Group looked closely at the geographic assignment systems of the UN Development Programme (UNDP), The UN Economic and Social Council (UNESC), the ITU, The ITU Council (ITUC), the ITU Telecommunications Development Bureau, the ITU Telecommunications Bureau, the ITU Radiocommunications Bureau and the Regional Internet Registries (RIRs). Each system is different. The only common practice between the various UN organizations is for countries to form <u>ad</u> <u>hoc</u> groups to deal with matters of mutual interest. These arrangements may be formal and long term, such as the Nonaligned Nations or the Commonwealth of Nations. Others are informal and short term to deal with a particular issue and are terminated as soon as a matter is resolved.

E. ICANN Must Formally Adopt and Maintain Its Own Unique Geographic Regions Framework

55. Given all the above, the Working Group believes that in the interests of good governance ICANN must formally adopt and maintain its own record of the assignment of countries and territories to ICANN's Geographic Regions.

56. Initially the Working Group was of the view that a suitable starting point for such an assignment already existed within the ICANN ambit. It had been successfully developed and applied by the Regional Internet Registries (RIRs). The current RIR system divides the world into 5 regions based solely on geographic location. These are: AfriNIC (Africa), APNIC (Asia Pacific), ARIN (Canada, United States

and many island nations in the Caribbean and North Atlantic Ocean), LACNIC (Mexico, Central America, South America and Latin America and Caribbean area), and RIPE NCC (Europe, Middle East and parts of Central Asia).

57. It appeared to the Working Group that using the RIR system as the starting point for a revised regional framework would have a number of benefits including:

    a. The number of Regions would remain at five, thus avoiding the significant restructuring that would result from a change in the number of regions.

    b. Fundamentally, ICANN is a technical organization and so aligning regions with the technical "infrastructure" of the numbering resource allocation system seemed logical and defensible.

    c. If adopted without modification, a total of only 62 countries and territories would move to new regions, but many of these were the result of assigning territories to their geographic region rather than to the region of their "mother country" (see paragraphs 58 and 60-64 below).

    d. A second group of changes would have been the move of several Middle Eastern and Central Asian countries out of the current Asia/Pacific/Australia Region into the European (RIPE) Region. This would have helped to reduce the very wide geographic spread of Asia/Pacific and also would have satisfied the wishes of many of the countries involved who consider themselves more orientated towards Europe than Asia.

    e. The third group of changes would have seen much of the English and French speaking Caribbean moving into the North American (ARIN) Region from the LAC Region (and Europe, in the case of some territories). Most of these countries have closer language, cultural and travel links with North America than they do with Latin America. In addition, it would have increased the number of countries in what has previously been a numerically very small Region and should have increased the options for representation and participation within the Region.

    f. As has been requested, there would have been no change to the African Region.

    g. It should have encouraged participation as joint meetings of the RIR and ICANN Region should have been possible.

58. The Working Group recognized that adopting the RIR framework would also have had some disadvantages, including:

    a. No Arab Region would have been created as has been requested.

b. Caribbean countries would have been split between two Regions, partly on geography and partly on language.

c. Some countries might not have wished to change Regions.

d. Some "countries" might not have wished their territories to be in a different region to themselves.

F. The Community Wants To Minimize Any Changes To The Current Structure

59. The Working Group believed that the measures detailed later in this report (concerning Special Interest Groups) would have helped to ameliorate the disadvantages outlined above. However, from the publication of the draft Final Report, it became very clear that the community as a whole wished to minimize any changes to the Regional structure. Whereas the Working Group had originally felt that countries and territories should move to a new regional structure based (loosely) on the RIR regional structure, with countries having the right to "opt out" of moving, the preponderance of those commenting on the draft report favored leaving the structure "as is", with countries having the right to "opt in" for a change in Region if they so wished. This was a disappointment to at least some members of the Working Group as inevitably changes will come about much more slowly under the "opt in" scheme.

G. ICANN Must Acknowledge The Sovereignty And Right of Self-Determination of States To Let Them Choose Their Region of Allocation

60. In order to protect the sovereignty and right of self-determination of states, the Working Group recommends that every country and territory should have the opportunity to request a move to another geographic region. The request should be initiated or supported by the local government of the relevant country or territory and should take into account the views of the local Internet community.

61. The existing geographic regions framework applied by ICANN allocates all "dependent or overseas territories" to the same region as their "countries", irrespective of their geographical location. It would appear that this decision was taken on the assumption that legal and political relationships between territories and "mother countries" are the same in every case. This is not consistently true across the globe. In some cases, the natives of a dependent territory are citizens of the "mother country" - in other cases they are not. Some territories are considered to be an integral part of their "mother country". Others have varying degrees of self-government. The native languages or cultures of those dependent territories may diverge widely from the "mother country". Additionally the issues that impact those territories may differ from the issues of primary importance to the "mother country".

62. ICANN should not become involved in the complex and differing relationships between territories and mother countries, but neither should it impose its own unilateral decisions. Individual territories (or collective community members within those territories) should be able to petition to move to a new ICANN geographic region. However, no territory re-assignment should be made if objections are raised by the Government of the "mother country".

63. The Working Group believes that countries or territories should be given the opportunity to seek reassignment from one region to another. This flexibility should be subject to the following or similar constraints:

    a. Any application for reassignment should have the support of the government of the country or territory and the local internet community.

    b. To reduce "churn", no country should be able to seek reassignment more frequently than once every 3 years.

    c. Consideration should be given to restricting reassignment to a region that is geographically adjacent to the existing region.

64. Once a reassignment is made, it should be applicable to ALL ICANN structures (SOs, ACs and the Board consistently.)

H. ICANN Communities Have Flexibly Applied Geographic Diversity Principles Over the Years. While The Board Should Remain Strictly Subject To The Current Framework, Flexibility Should Be Preserved For Other Structures.

65. In its Initial Report, the Working Group noted that the original concept of geographic/regional diversity in the representational make-up of the ICANN Board has been expanded over the years to extend to nearly every sub-structure of the ICANN organization. That concept now reflects not only diversity of representation in various communities, but also includes considerations of how community participation is encouraged/supported and affects the management of the organization's technical and administrative resources as well.

66. The new regions framework should apply to the population of the ICANN Board in a clear and consistent manner, but application of the system to ICANN community structures beyond the Board should allow for considerable flexibility. The Working Group observes that experience over the last decade has demonstrated that individual communities are in the best position to craft unique operational solutions

that honor the central goal of geographic diversity within their operations[21].

67. While the Working Group recommends that ICANN maintain a modified single top-down "geographic regional structure," how each SO-AC meets the geographic and cultural diversity requirements of that system should be up to them. Those communities may, or may not, make use of the regional framework. It should be noted that the Working Group is NOT suggesting that each SO or AC be permitted to create its own regional framework. Either the ICANN-wide framework is to be used or some alternate method of ensuring diversity can be proposed for Board review and approval.

68. While the Board could conclude that strict adherence to certain standards might be the best way to encourage participation and build-up regional competence or participation in certain areas, the geographic regions framework should not be so inflexible as to force certain communities to prevail upon unwilling or under-qualified participants to satisfy the regional participation requirement.

69. The Working Group recommends that the Board give all SO and AC structures the opportunity to review their individual by-laws or charter requirements as they apply to the organizational principles of geographic and cultural diversity. In this context it must give some consideration to addressing current inconsistencies in the application of geographic diversity by the Board, compared to the same treatment by some SO's and AC's. In particular, the principle of geographic diversity at the Board level is evaluated by the citizenship (or residency) of individuals, but some SOs and ACs (for example, the ccNSO and ALAC) apply the diversity rules at the level of countries and territories rather than individuals. Where revisions are recommended by individual communities, then the Board should consider whether subsequent ICANN-wide Bylaw amendments are advisable or necessary.

I. "Special Interest Groups" or "Cross-Regional Sub-groups" Offer New Diversity Opportunities

70. During its research and community consultations, it became clear to the Working Group that evolving international norms obligate ICANN to give increased consideration to cultural and language elements of diversity – particularly as they relate to elements of geographic diversity.

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[21] As an example of this perspective, the GAC Chair has observed that the current ICANN structuring of its geographic regions has little or no practical value for the GAC as a framework for rotation or geographic diversity of positions - noting that since the GAC counts governments as its members, in some regions there can be large imbalances in the number of GAC members (e.g., there are only two governments in the ICANN North America region, in stark contrast to the much more numerous governments in other ICANN regions).

71. Over the past decade, a broader recognition of what "diversity" means to the ICANN community has evolved. Geography remains of primary importance, particularly at the Board level, but additional considerations of culture and language diversity have also been raised from time-to-time in different communities. If ICANN intends to remain true to the concept of "evolving international norms" then these additional elements must be addressable in the context of the geographic regions framework.

72. As the ICANN organization embarks on the next phase of its existence, it should remain cognizant that community members who are not currently participating may be just as important to the health and diversity of the organization as those who are currently active and participating. Under-represented regions or communities who currently are not aware of the importance of ICANN to their work must have the opportunity to find their place in the framework.

73. Formal written submissions and informal community feedback to Working Group members over the last three years reflects an increased awareness of the potential benefits-of and interest-in cultural and language diversity within the ICANN community. For example, during the various public comment opportunities on the Working Group's Initial and Interim Reports, a number of commenters called for an "Arab Region" to be created. Some reflected that the Arab community is not limited to a specific geographic region in that Arab ccTLDs, Arab LIRs, private sector, civil societies, and others are scattered around the world including some in the Asia/Pacific, some in Europe, and some in Africa. This interest seems to reflect both cultural and language ties that are not particularly related to a specific geographic region.

74. The recent success in introducing internationalized domain names (IDNs) is also contributing to the growing concept of potential cross-regional groupings. As of 26 August 2013, ICANN had received a total of 38 individual requests for "fast track" IDNs and 35 IDN ccTLDs were in the root zone.[22] At present, as a result of demand for new IDN gTLD's, there were applications for 116 IDN gTLDs, 62 of which have been delegated.[23]

75. Additionally, representatives of small Island states have talked with Working Group members about the unique characteristics they share (e.g., geographic size, small populations, lack of resources) with other sovereignties that may not be in geographic proximity to them.

76. In this context, the Working Group recommends that ICANN seek ways to

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[22] The requests span 23 different languages, including: Chinese, Arabic, Russian, Sinhalese, Tamil, and Thai. See e.g., https://charts.icann.org/public/index-idn.html.
[23] See https://gtldresult.icann.org/application-result/applicationstatus/viewstatus

recognize and accommodate Special Interest Groups.

77. Some such groupings might restrict their interest to a single SO or AC, while others might span all of ICANN's communities. This recommendation would permit, for example, small island nations, the countries of the Caribbean or Arab states to come together to promote matters of common interest without necessitating any changes to the "formal" geographic regions framework. Other groups might be more "topic" based. The community made a strong case for the inclusion of these types of groups in their community comments and the workshops hosted by the Working Group at ICANN Public Meetings. The Working Group thinks that such "bottom-up" interest should be recognized and encouraged.

78. At a minimum, the Working Group recommends that the following principles be adopted with respect to Special Interest Groups:

    a. The groups should be complementary to the formal regional framework, and should not replace it.

    b. The groups should not form any part of ICANN's formal decision-making structure but, of course, would be free to promote their interests and points of view as they consider appropriate within the ICANN community and its multi-stakeholder participation and engagement mechanisms.

    c. The "benefits" of recognition by ICANN would be dependent upon available funds but should be targeted primarily at facilitating communication between members -- for example being able to hold meetings at ICANN conferences, use of an ICANN mailing list, being referenced on the ICANN web-site, and perhaps providing some teleconference facilities.

    d. Recognition might be dependent upon the group having a minimum number of members.

J. Implementation Mechanisms And Processes Must Be Developed By Staff

79. If the Board accepts its other recommendations, the Working Group recommends that the Board direct ICANN Staff to -

    • Develop and publish a publicly available database showing the ICANN Geographic Region to which each jurisdiction is currently allocated (based upon the "old" rules).

    • Develop a self-selection process for jurisdictions to apply to change the region to which their territory or country is allocated, and a process for updating the database when a decision is reached.

- Develop and implement a communication plan announcing the self-selection process.

- Provide support to ICANN SOs, ACs and other applicable organizational structures to formally consider whether to continue to the existing framework or to develop their own mechanisms (with Board oversight) for ensuring geographic diversity within their own organizations.

- Develop criteria for evaluating the implementation and effectiveness of the geographic regions framework five years from now.

K. The Board Must Preserve Its Oversight And Future Review Opportunities

80. The ICANN community cannot predict potential communities or participants who are not yet known or may not yet exist. The new geographic framework must remain flexible enough to accommodate new players and potential new regions as they evolve. The Board needs to maintain ultimate oversight over the framework, but the Working Group believes that the present requirement in the Bylaws for a review to be carried out every three years is excessive and impractical. The Working Group therefore recommends a review should be carried out every five years and that the Bylaws be amended accordingly. Adherence to the five-year review cycle should be part of the Board's ongoing/regular agenda that is tracked and monitored by the ICANN Staff.

IV. Summary of Conclusions and Recommendations

81. The principle of geographic diversity remains an important concept in the ICANN community. This diversity is not only one of geographic presence. Cultural, language, economic and other situational factors that from time to time forge commonalities within the Internet community must also have the opportunity to be addressed.

82. The Working Group concludes that wholesale modifications to the original geographic regions framework is not merited, and recommends that ICANN should adopt its own Geographic Regions Framework based upon the current assignment of countries to regions. This new framework system should govern the make-up of the ICANN Board and should serve as the default for other parts of the ICANN community.

83. For the time being, while continuing to mandate geographic diversity on the ICANN Board, the Working Group recommends that the Board give all individual ICANN Supporting Organizations and Advisory Committees the opportunity to develop or affirm their existing geographic diversity rules and mechanisms or to present the Board with their own particular diversity methodology that is more appropriate to

their unique operational and community characteristics.

84. The Working Group recommends that the Board direct Staff to prepare and maintain ICANN's own unique organizational table that clearly shows the allocation of countries and territories (as defined by ISO 3166) to its existing five Geographic Regions. The initial allocation should reflect the *status quo* of the current assignments. However, Staff should also develop and implement a process to permit stakeholder communities in countries or territories to pursue, if they wish, re-assignment to a geographic region that they consider to be more appropriate for their jurisdiction.

85. The Working Group recommends that ICANN seek ways to recognize and accommodate Special Interest Groups to promote the interests and unique attributes of stakeholder communities that may not clearly fit into the formal top-down regional structures. These "bottom-up" groupings would be complementary to the formal regional and decision-making framework, and would not replace it. These groups would be free to promote their interests and points of view as they consider appropriate within the ICANN community and its multi-stakeholder participation and engagement mechanisms.

86. Finally, the Working Group recommends that the Board maintain oversight over the existing framework at all levels within the ICANN organization and review the effectiveness of its application at regular five-year intervals.

V.   Next Steps

87. Communities supplying participants to this Working Group were given the opportunity to comment on the recommendations herein. Copies of the subsequent communications from commenting communities (ALAC, ccNSO and GNSO) are appended to this Final Report (see Appendix B). However, due to the substantial period of time that has passed between those comments and the submission of this Final Report to the Board, Working Group members believe that all ICANN communities should have a fulsome opportunity to review and comment on these recommendations.

88. Thus, the Working Group recommends that the Board direct staff to manage a public comment period of at least 120 days to give the community an opportunity to thoroughly review the proposals and provide any additional comments on its recommendations. Given other community workload demands requests for additional time for review and comment from any communities should be honored. Members of the Working Group and support staff are available to provide briefing opportunities to any and all interested community groups.

# # #

APPENDIX A

Working Group Members and staff support

Working Group Members:

Adiel Akplogan (ASO/NRO)(until January 2015)
David Archbold (ccNSO) Chair (until January 2013)
Fahd Batayneh (ccNSO) (until August 2013)
Ching Chiao (GNSO) From November 2011
Olga Cavalli (GNSO) Until October 2011
Zahid Jamil (GNSO) (until October 2011)
Cheryl Langdon-Orr (ALAC-ccNSO)
Carlton Samuels (ALAC)
Paul Wilson (ASO/NRO)

ICANN Staff Support:

Bart Boswinkel
Mandy Carver
Gisella Gruber
Robert Hoggarth

APPENDIX B

Community Responses to draft of Final Report document:

(See subsequent pages and pdf format files associated with this document)

WGGR – Final Report

ALAC Statement

AL-ALAC-ST-0114-03-00-EN

ORIGINAL: English DATE: 15 January 2014 STATUS: Final

AT-LARGE ADVISORY COMMITTEE
ALAC Statement on the Request For Written Community Feedback - Geographic Regions Working Group Recommendations

Introduction

Tijani Ben Jemaa, ALAC member from the African Regional At-Large Organization (AFRALO) and ALAC Leadership Team member, composed an initial draft of this Statement after discussion of the topic within At-Large and on the Mailing Lists.

On 28 December 2013, this Statement was posted on the At-Large Request For Written Community Feedback - Geographic Regions Working Group Recommendations Workspace.

On 13 December 2013, Olivier Crépin-Leblond, Chair of the ALAC, requested ICANN Policy Staff in support of the ALAC to send a Call for Comments on the Recommendations to all At-Large members via the ALAC-Announce Mailing list.

On 9 January 2014, a version incorporating the comments received was posted on the aforementioned workspace and the Chair requested that Staff open an ALAC ratification vote on the proposed Statement.

On 15 January 2014, Staff confirmed that the online vote resulted in the ALAC endorsing the Statement with 14 votes in favor, 0 votes against, and 0 abstentions. You may review the result independently under: http://www.bigpulse.com/pollresults?code=36347CwXIhyQBE4faXXf2rrF

Summary

1. The ALAC supports the recommendation for ICANN to adopt a more rigorous approach by re- defining a clear and consistent classification framework that assigns countries and territories to regions. Nevertheless, it

would be helpful if the way and the criteria for such re-definition were suggested.

2. The ALAC strongly supports that ICANN must acknowledge the Sovereignty and right of self- determination of States to let them choose their region of allocation and request, if they so desire, a move to another geographic region.

3. When we speak about geography, we are speaking about regions, and the ALAC doesn't believe that the geographic regions could be in any case built on other consideration than the regional one. The cultural and linguistic diversity are important but can't impact the geographic regions framework. If we want it to be regions plus culture plus language, we have to call it diversity, not geographic regions.

4. The ALAC supports the recommendation to amend the bylaws to modify the present requirement for review of the Geographic Regions from three years period to five.

Dear Dave,

Thank you for your original note of 3 July 2013 regarding the Final Report of the Geographic Regions Review Working Group that you chair.

The At-Large Advisory Committee has considered the Working Group recommendations and would like to make the following remarks:

Recommendation B
The ALAC supports the recommendation for ICANN to adopt a more rigorous approach by re- defining a clear and consistent classification framework that assigns countries and territories to regions. Nevertheless, it would be helpful if the way and the criteria for such re-definition were suggested.

Recommendation E
Using the RIR framework wouldn't be a good approach because it is being contested even inside the RIR community. If we feel that the current ICANN framework is not good, we should not replace it with a contested one.

Recommendation G
The ALAC strongly supports that ICANN must acknowledge the Sovereignty and right of self- determination of States to let them choose their region of allocation and request, if they so desire, a move to another geographic region.

We also believe that any application for reassignment should have the support of the government of the country or territory and the local internet community.

We think that requesting a reassignment each 3 years is too much. The maximum frequency shouldn't exceed one request per 5 years.

Recommendation H

While the paragraph 67 mentions that it is not suggested each SO and AC be permitted to create its own regional framework, the recommendation says that the manner each SO-AC (but not the board) meets the geographic diversity requirements of that system should be up to them, and that they may, or may not, make use of the regional framework. The ALAC find that very ambiguous and could lead to a misunderstanding.

Recommendation I

When we speak about geography, we are speaking about regions, and the ALAC doesn't believe that the geographic regions could be in any case built on other consideration than the regional one. The cultural and linguistic diversity are important but can't impact the geographic regions framework. If we want it to be regions plus culture plus language, we have to call it diversity, not geographic regions.

The "special interest groups" is a legitimate interest that can be recognized by ICANN but not in the context of geographic regions.

Recommendation K

Finally, the ALAC supports the recommendation to amend the bylaws to modify the present requirement for review of the Geographic Regions from three years period to five.

# # #

ccNSO Community Statement

Geographic Regions Review Working Group Final Report Reaction Form Template

Dear Dave,

Thank you for your original note of 3 July 2013 regarding the Final Report of the Geographic Regions Review Working Group that you chair.

The Country Code Names Supporting Organization has considered the Working Group recommendations and our community supports the Working Group Final Report.

Best regards,

Byron Holland, chair of the ccNSO

Date: 21 December 2013

# # #

GNSO Council Statement

13 December 2013

David Archbold
Chair, ICANN Geographic Regions Working Group

Dear David,

Written notification and feedback on the work of the Geographic Regions Working Group

First, we would like to acknowledge the considerable amount of effort that has gone into your work and take the opportunity to thank you and your colleagues for that work.

Second, we would like to acknowledge some key areas which we strongly support, in particular the following points:

1. **Executive Summary item 7:** *" … provide flexibility to individual communities and structures within ICANN … " by permitting them to " … follow the same framework as the Board, or develop their own mechanisms (with Board oversight) for ensuring geographic diversity within their own organizations."*

2. **Executive Summary Item 8: " …** *Staff should also develop and implement a process to permit stakeholder communities in countries or territories to pursue, if they wish, re-assignment to a geographic region that they consider to be more appropriate for their jurisdiction."*

Third, we would like to call attention to one area which raises questions for us as follows:

3. **Executive Summary Item 9**: *" … the Working Group recommends that*

ICANN seek ways to recognize and accommodate Special Interest Groups to promote the interests and unique attributes of stakeholder communities that may not clearly fit into the formal top down regional structures. These "bottom-up" groupings would be complementary to the formal regional framework, and would not replace it. They would not form any part of ICANN's decision-making structure but would be free to lobby for the support of elected representatives."

Here, some clarification of what is meant by the last sentence would be helpful. Assuming we understand the intent, we would suggest that such groups work within existing structures as much as possible to communicate their concerns.

We thank you again for your efforts in this regard and for the

opportunity to provide input. Yours sincerely,

Jonathan Robinson
Chair, ICANN GNSO Council

# # #

Pages 44 – 57 removed. Privileged and Confidential.

TITLE:	**Consideration of Independent Review Process (IRP) Interim Supplementary Rules of Procedure**

Documents

The following attachments are relevant to the Board's consideration of the IRP Interim Supplemementary Rules of Procedure.

Attachment A is the proposed IRP Interim Supplemementary Rules of Procedure.

Background Links

The following links are relevant to the Board's consideration of of the IRP Interim Supplemementary Rules of Procedure.

ICANN Bylaws, Article 4, Section 4.3, available at

https://www.icann.org/resources/pages/governance/bylaws-en/#article4.

Current IRP Supplentary Rules of Procedure, available at

https://community.icann.org/download/attachments/59643726/adrstage2014403.pdf?version=1&modificationDate=1467815667000&api=v2.

Submitted By:	Amy Stathos, Deputy General Counsel
Date Noted:	12 October 2018
Email:	amy.stathos@icann.org

24 October 2018
From: Samantha Eisner, Deputy General Counsel
Re: 23 October 2018 Letter re Independent Review Process Interim Supplementary Rules

On the evening of 23 October, the Board received a letter signed by four parts of the Non-Contracted Parties House of the GNSO to inform the Board that there is a lack of consensus in the community on the issue of "repose" (also known as the outside time for filing, or statute of limitations) for IRPs. Specifically, the issue is with lack of consensus over Rule 4 that is found in the proposed Interim Supplementary Procedures, which are before the Board for consideration at the Board meeting on the 25th.[1] The drafters write to provide their opinion on the "incompatibility between the proposed Interim Rules and ICANN's bylaws."

ICANN org has, for over 1.5 years, gone on record disputing that issue. From ICANN legal's perspective, the use of an outside time limit on when IRPs can be filed is fully consistent with the ICANN Bylaws. ICANN legal would not present an item for Board consideration that is in violation of the Bylaws. The latest writing on this Bylaws' issue on repose was ICANN org's input into the public comment on this issue, provided as an accompanying document for reference. That comment includes many other justifications for the use of a outer time limit, but specifically addresses Sidley's[2] contention as follows:

"There has been a suggestion that imposing an outer time limit on the filing of an IRP is against the Bylaws, because the Bylaws use language that says "after a claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the dispute." This analysis was provided by Sidley, which participated in both the development of the CCWG-ACCT report and the ICANN Bylaws, and is not based on anything within the record of the CCWG or the Bylaws development process. Their reading is faulty, is not determinative, and seeks to deprive the ICANN community of identifying what is a reasonable limitation on the use of an accountability mechanism. To be clear, there was no discussion within the Bylaws development that would support

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[1] The Independent Review Process Implementation Oversight Team (IRP IOT) is charged under the Bylaws with developing proposed Supplemental Procedures to support the IRP. The IOT concluded its work on the Interim Supplementary Procedures on 21 October 2018 after significant discussion, and the participants did not raise objection to moving the draft Interim Supplementary Procedures to the Board. There are still other items that the IOT must consider before developing a final set of Supplementary Procedures.
[2] Sidley was the law firm selected to provide legal advice to the community during the Transition, and they were part of the Bylaws' drafting work. They have provided separate advice to the Independent Review Process Implementation Oversight Team on a couple of occasions.

1

Sidley's current interpretation. The previous version of the Bylaws allowed only for a fixed period of time for bringing an IRP, measured from the publication of Board minutes. There is nothing in any record that suggests that because the Bylaws faithfully reflected the CCWG-ACCT's decision to defer a discussion on how long claimants would have to file an IRP, that the ICANN Community would be declared to be in violation of the Bylaws when setting reasonable time limits."

We have modified the Board resolution and rationale to better reference a discussion on this issue, and that accompanies this briefing. Importantly, because the discussion on repose is still ongoing in the IOT, ICANN has committed that if any longer period of time is provided in the final set of Supplementary Procedures approved by the Board, ICANN would include language to protect against any prejudice to claimants on this issue. The set of procedures before the Board is Interim, and this repose issue is specifically reserved for continued discussion.

If the Board does not proceed with consideration of the Interim Supplementary Procedures, then ICANN org will not have a set of Procedures that align with the Bylaws when an IRP is filed. While there have not been any recent IRP filings, ICANN org anticipates that one or more IRPs will be initiated in the coming months. It is essential to have something in place, even if there is additional work to be done on the Supplementary Procedures.

Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)[1]

Revised as of [Day, Month], 2018

Table of Contents

These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution's international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3 of ICANN's Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016[2]; (2) to the extent public comments received in response to the USP reflected clear movement away from either the current Supplementary Procedures or the

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[1] CONTEXTUAL NOTE: These Interim Supplementary Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

[2] *See* https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en.

USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

1. Definitions

In these Interim Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN's Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

1) exceeded the scope of the Mission;

2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or

5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN's contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the IRP Provider (IRPP) under Article 4, Section 4.3 of ICANN's Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant's filing of a written statement of a DISPUTE with the ICDR.

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws.

ICDR RULES refers to the ICDR's International Arbitration rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and/or participation as an *amicus*, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8)

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.

2. Scope

The ICDR will apply these Interim Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect. In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced. IRPs commenced prior to the adoption of these Interim Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Interim Supplementary Procedures are subsequently amended, the rules surrounding the application of those amendments will be defined therein.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated. The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is Independent and Impartial pursuant to the ICDR RULES. In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist. In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Interim Supplementary Procedures.

4. Time for Filing[3]

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.

5A.   Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies).The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an "in-person hearing" refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-

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[3] The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

With due regard to ICANN Bylaws, Article 4, Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.

5B.   Translation

As required by ICANN Bylaws, Article 4, Section 4.3(l), "All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed." Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into.   A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT's certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT's proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative's proficiency

in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT's proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN's language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

6. Written Statements

A CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the CLAIMANT'S claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

In addition, the IRP PANEL may grant a request for additional written submissions from any person or entity who is intervening as a CLAIMANT or who is participating as an amicus upon the showing of a compelling basis for such request. In the event the IRP PANEL grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages, double-spaced and in 12-point font.

For any DISPUTE resulting from a decision of a process-specific expert panel that is claimed to be inconsistent with ICANN's Articles of Incorporation or Bylaws, as specified at Bylaw Section 4.3(b)(iii)(A)(3), any person, group or entity that was previously identified as within a contention set with the CLAIMANT regarding the issue under consideration within such expert panel proceeding shall reasonably receive notice from ICANN that the INDEPENDENT REVIEW PROCESS has commenced. ICANN shall undertake reasonable efforts to provide notice by electronic message within two business days (calculated at ICANN's principal place of business) of receiving notification from the ICDR that the IRP has commenced.

7. Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMAINT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities <u>shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL:</u>

<u>i.</u>   A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));

<u>ii.</u>   If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and

<u>iii.</u>   If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae,* and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*.   Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.[4] The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

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[4] <u>During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of participation from *amicus curiae*, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.</u>

8. Exchange of Information

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of requests for exchange of information.

On the motion of either Party and upon finding by the IRP PANEL that such exchange of information is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that the Panel determines are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law (including, without limitation, disclosures to competitors of the dislosing person, group or entity, of any competition-sensitvie information of any kind). Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

a.   With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.

b.   All DISPUTES shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

c.   For Claims arising out of the Board's exercise of its fiduciary duties, the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

d.   With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN's obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.

e.   IRPs initiated through the mechanism contemplated at Article 4, Section 4.3(a)(iv) of ICANN's Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.

12. IRP PANEL Decisions

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.

13. Form and Effect of an IRP PANEL DECISION

a.   IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties. IRP PANEL DECISIONS shall be issued in English, and the English version will be authoritative over any translations.

b.   The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.

c.   Subject to Article 4, Section 4.3 of ICANN's Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under

the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

ICANN organization submits this comment to express its continuing concerns with and opposition to the elimination of a "statute of repose" from the proposed Updated Supplementary Procedures for ICANN's Independent Review Process (IRP), Rule 4 (Time for Filing). ICANN org's comment specifically relates to the proposed elimination of any outer time limit for the filing of an IRP. ICANN org offers this comment to reiterate the contributions it made within the IRP Implementation Oversight Team (IOT) as it deliberated on this issue, and to flag that if an outer limit on filing is not provided within the Supplementary Procedures presented to the ICANN Board for approval, the concerns stated within this submission would be raised with the ICANN Board at that time.

In the version of the Draft Updated Supplementary Procedures (Draft Rules) previously posted for comment, Draft Rule 4, Time for Filing provided that a "CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material [e]ffect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction." Draft Rule 4 (31 October 2016). Following receipt of public comments (*see* https://www.icann.org/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf), the IOT discussed the issue of "repose," which has two components:

1. How long after a person is aware (or reasonably should have been aware) of a material effect of an action or inaction by ICANN giving rise to the dispute must an IRP claim be filed; and

2. How long of a period of time, in total, should pass before it is no longer reasonable for a person to claim he/she became aware of an action or inaction by ICANN that allegedly caused the claimant material harm so as to give rise to a dispute?

The first question was settled amongst the IRP IOT, which agreed that a 120-day period from becoming aware (or reasonably should have been aware) of an action (rather than the previously proposed 45 days in the Draft Rules) is a sufficient time for filing. All participating IOT members, including the ICANN org, agree to this change.

ICANN org's objection relates to the second question. The new language posted for comment by the IRP IOT **removes** any outer limit from the date of ICANN's action giving rise to the IRP to the time of the filing of an IRP. This means that an IRP could be filed 2 years, 5 years, even 10 years after the act being challenged, so long as an IRP is filed within 120 days of when the claimant learned of ICANN's act and the alleged harm caused. This removes any finality to ICANN's actions, ignores the principles supporting the IRP, and depletes, rather than upholds the principle of accountability. Removing an outer time limit on filing fundamentally changes the nature of the IRP from holding ICANN accountable to its Articles of Incorporation (Articles) or Bylaws into an individualized grievance mechanism for matters that were long thought to be closed. It

also provides an ability to raise challenges to ICANN's actions long past any established statute of limitations that might be available in a court of law.

The use of outside time limits on potential challenges is a concept accepted across legal systems, often referred to as a statute of limitations. When the IRP was first introduced in ICANN's Bylaws, there was no time limit to file. Time limits were introduced in 2012, upon the recommendation of a panel of dispute resolution and corporate governance experts, to bring the IRP more in line with accepted dispute resolution standards. The time limit then put in place was approximately three months from Board action.[1] Even with a time limit of 12 months, as initially recommended by the IOT, the outer limit to file an IRP would be approximately *9 months* longer than claimants have had for the past few years.[2]

1.   The IRP is a Tool to Hold ICANN Accountable to the Articles of Incorporation and Bylaws

The IRP is a way to identify if ICANN violated its Articles of Incorporation or Bylaws, and to hold ICANN accountable to those findings. The IRP cannot result in individual damages or awards or relief from ICANN. No one in the ICANN community is benefited by long delays in identifying ICANN's improper actions.

2.   Placing An Outer Time Limit to File Upholds the Purposes of the IRP

Placing an outer time limit on how long a claimant can challenge an act of ICANN is consistent with the purposes of the IRP as defined under Article 4, Section 4.3(a)(vii) of the Bylaws, which is to "[s]ecure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes."[3] Through the Enhancing ICANN Accountability Process, the ICANN community agreed that the IRP should be "[t]ransparent, efficient and accessible (both financially and from a standing perspective) [and] [d]esigned to produce consistent and coherent results that will *serve as a guide for future actions*."[4] One of the purposes of the IRP is to *"[r]educe disputes going forward by creating precedent to guide and inform* the ICANN Board, staff, Supporting Organizations (SOs) and Advisory Committees (ACs), and the community in connection with policy development and implementation."[5]

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[1] The prior time limitation to file an IRP was 30 days from the posting of the minutes and Board briefing materials of the meeting during which the challenged action occurred.

[2] The Accountability Structures Expert Panel (ASEP), a group of international experts on issues of corporate governance, accountability and international dispute resolution, was convened pursuant to the Accountability and Transparency Review Team's (ATRT1) Recommendations. The ASEP recommended that time limits be introduced for the filing of an IRP. See Report by Accountability Structure Expert Panel (ASEP Report), October 2012, Pg. 35, https://www.icann.org/en/system/files/files/report-26oct12-en.pdf.

[3] Bylaws, Art. 4, Section 4.3(a)(vii).

[4] CCWG WS1 Final Report, Annex 7, Paragraph 05.

[5] CCWG WS1 Final Report, Annex 7, Paragraph 07.

Removing any time frame within which one must file an IRP works against these principles. The longer it takes to challenge an action of ICANN, the less consistent or coherent a review of that act will be. Board members, organization personnel, and community members change; memories fade; documentation may no longer be available. Instead of guiding future actions, the outcome of an IRP on an action taken many years prior would be backward looking, and raise bigger questions of how would the community move forward?

In short, allowing an IRP to be brought years after the action in question removes: (1) incentive for the ICANN community to be vigilant in raising issues of ICANN's accountability to its Bylaws and Articles; and (2) any sense of stability or finality to ICANN's actions.

In its deliberations, one of the primary examples that the IOT relied upon to support the removal of a statute of repose is the possibility that a policy recommendation addressing content (and therefore outside of ICANN's mission) came out of the GNSO's policy development process (PDP) and was approved by the ICANN Board. In the example, years later a potential registrant was impacted by the policy approved by the Board and wished to bring an IRP. The suggestion that ICANN should never have finality to its decisions is therefore based upon a presumption that *all parts* of the ICANN community allowed an out-of-mission policy to pass through the PDP (including public comment) and that the Board then approved an out-of-mission policy. Further, once implemented, no one came forward to challenge that action for a matter of years.

This example shows that eliminating any outside time limit on filing encourages participants to *wait* to hold ICANN accountable, as opposed to addressing potential Bylaws violations when they are thought to have occurred. This does not serve accountability or the purposes of the IRP, and is based on a complete breakdown of the multistakeholder model that the IRP is not designed to fix.

3. **Removing an Outer Time Limit Creates Unprecedented Rights and Destabilizes ICANN**

Removing an outer time limit on filing an IRP removes any certainty from ICANN's authority to enter contracts, including with its registries and registrars. It allows people to come forward, years later, to try to upend binding agreements. ICANN's contracted parties already agree to be bound by consensus policies that can change their obligations mid-agreement, and have agreed with that level of flexibility in contracting with ICANN. This proposed change would remove any certainty in ICANN's authority to enter each of those agreements, and would greatly impair ICANN's ability to perform its mission.

Each of the over 2,500 contracts that ICANN holds with registries and registrars is grounded in law and has legal limitations on when disputes related to that contract may be raised. The suggested removal of time to file an IRP could allow challenge to an

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ICANN action taken a decade ago on a contract, or could impair a contract entered into years before the IRP procedures went into effect. In either situation, even if an IRP were filed to challenge ICANN's old actions in relation to a contract and ICANN won, the mere fact that ICANN would allow the IRP rules to be modified in a way that would interfere with these contracts could subject ICANN to legal liability under the law. This would create confusion, uncertainty, and put ICANN at risk of facing staggering costs to address this situation.

ICANN is not aware of any other organization that allows a challenge to be raised against any action at any time. Similarly, the members of the IOT pushing for the removal of time limits to file an IRP have offered no examples of other organizations that open their actions up to challenge at any time. The removal of time limits to file an IRP is unprecedented and puts the entire ICANN model at risk.

4.   **The Time to File an IRP Runs From Each Individual Action (or Inaction)**

Multiple opportunities exist to challenge ICANN's acts in a timely manner. Every time the ICANN Board or organization take an action, that comes with the possibility that someone might declare that act to be outside of the Articles or Bylaws and allege that act caused material harm. For example, if the ICANN Board approves a policy recommendation, and then the ICANN org implements that policy in a way that is alleged to be outside of the Bylaws or the Articles, the implementation decision is a separate act from the policy approval, and has the potential to give rise to new grounds for an IRP – even if that implementation date was years after the policy approval date. If ICANN org later takes compliance activity related to that policy in a way that is alleged to be outside of the Bylaws or the Articles many years after the policy approval date, that action, too, is a new act of the organization that can be challenged through an IRP. There is no need to draft a procedural rule that allows challenge of the very first act on an issue, no matter when taken, as the IRP can be timely used to challenge the specific act alleged to cause the Articles or Bylaws violation.

5. **An Outside Time Limit to File an IRP is Consistent With the Bylaws**

In building its first set of Draft Supplementary Procedures for public comment, the IOT developed the time for filing rule in accordance with its obligations under the Bylaws. The Bylaws state that the Supplementary Procedures must identify "[t]he time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute."[6] The IOT proposal stated both the 45-day window from becoming aware (or reasonably should have been aware) of the harm caused by the action, as well as the outer limit of 12-months from the date of the action. The CCWG-ACCT deferred the issue of setting a time frame, leaving the issue to the IOT.[7] It is fully within the IOT's power, and in alignment with the

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[6] ICANN Bylaws, Section 4.3(n)(iv)(A).

[7] CCWG WS1 Final Report, Annex 7, Paragraph 19.

Bylaws, to determine that there is a time period after which it would not be reasonable for a claimant to bring an IRP.[8]

ICANN org stands behind and supports the enhanced accountability measures that the CCWG-ACCT recommended, including the expanded IRP. However, each of ICANN's accountability mechanisms need to be viewed in context to make sure they fit with ICANN's work and support the ICANN community. ICANN's actions do not exist in a vacuum: they are actions on community-made policy recommendations; actions that impact ICANN's contracted parties and the business decisions they make; and actions that end-users, registrants and all other parts of the multistakeholder community rely upon. All parts of ICANN rely upon ICANN acting within its Articles of Incorporation and Bylaws, and have an interest in swift action when ICANN is not doing so. The IRP does not exist to provide relief to a single individual or entity; the IRP exists to hold ICANN accountable to its Articles of Incorporation and Bylaws. The ICANN community has every need to bring swift challenges when ICANN has acted improperly. Removing any outer limit on when that act can be challenged only serves to harm accountability across ICANN.

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[8] There has been a suggestion that imposing an outer time limit on the filing of an IRP is against the Bylaws, because the Bylaws use language that says "after a claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the dispute." This analysis was provided by Sidley, which participated in both the development of the CCWG-ACCT report and the ICANN Bylaws, and is not based on anything within the record of the CCWG or the Bylaws development process. Their reading is faulty, is not determinative, and seeks to deprive the ICANN community of identifying what is a reasonable limitation on the use of an accountability mechanism. To be clear, there was *no* discussion within the Bylaws development that would support Sidley's current interpretation. The previous version of the Bylaws allowed only for a fixed period of time for bringing an IRP, measured from the publication of Board minutes. There is nothing in any record that suggests that because the Bylaws faithfully reflected the CCWG-ACCT's decision to defer a discussion on how long claimants would have to file an IRP, that the ICANN Community would be declared to be in violation of the Bylaws when setting reasonable time limits.